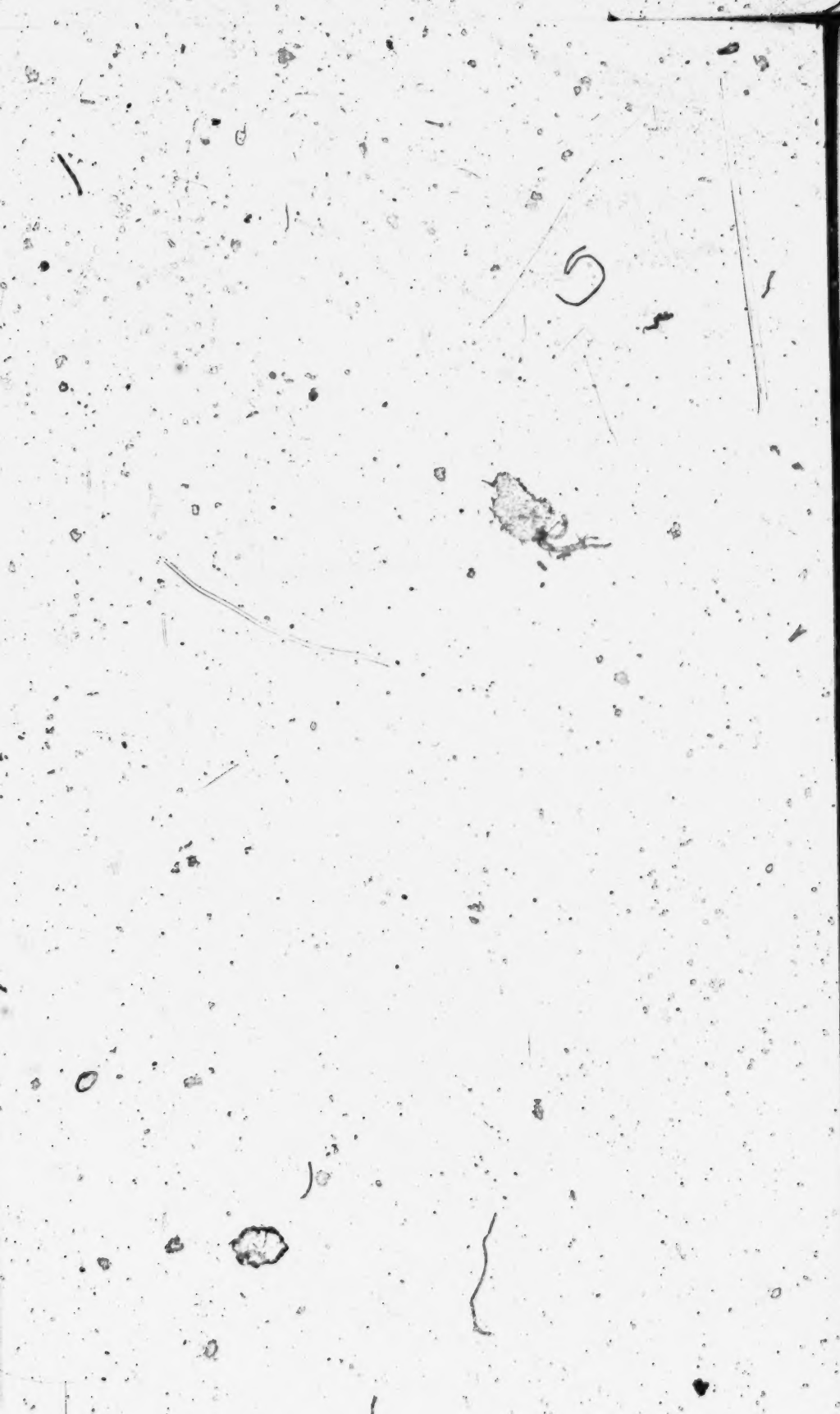


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 391.

THADDEUS G. BENTON,

Petitioner,

v.

VINSON, ELKINS, WEEMS and SEARLS, a Partnership of Lawyers Composed of JAMES A. ELKINS, WHARTON E. WEEMS, WARREN JEFFERSON DALE, DAVID T. SEARLS, *et al.*, and each of the members of said partnership, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT DAVID T. SEARLS.

OPINIONS BELOW.

There was no written opinion in the District Court, petitioner's motion having been denied from the bench (A37*) The *per curiam*** affirmance by the U. S. Court of Appeals for the Second Circuit is reported at 255 F. 2d 299 (App. to Petition, p. 1A-2A). A petition for rehearing was denied *per curiam* without opinion (App. to Petition, p. 3A).

* References preceded by A are to Appendices to Briefs in the Court of Appeals; references preceded by R are to the original typewritten record in the District Court which petitioner has filed in this court.

** Clark, Chief Judge, Hincks and Stewart, Circuit Judges.

JURISDICTION.

Petitioner invokes this Court's jurisdiction under 28 U. S. C. §§2101 (c) and 1254.

QUESTION PRESENTED.

Petitioner, a New York attorney with over thirty-seven years experience at the bar, brought this action in a New York State court against the Houston, Texas law firm of Vinson, Elkins, Weems and Searls and its twenty-seven partners based on a prior litigation in the United States District Court in Texas. The instant action was removed to the Federal District Court in New York by respondent Searls who thereupon moved to transfer the action to the Texas District Court. Petitioner claims that he and his counsel made a "mistake" in not being aware of the Texas Statute of Limitations at the time of opposing the transfer motion, despite the fact that the District Court judge who heard the motion raised the question of the statute of limitations *sua sponte* and petitioner cited in his brief on the transfer motion the leading case on the question of the statute of limitations to be applied in cases of this type. Thus, the question presented is:

> Was Rule 60(b) of the Federal Rules of Civil Procedure, which authorizes a district court in its discretion to relieve a party from a "mistake", intended to be construed so as to relieve an experienced attorney and his independent counsel from an inexcusable failure to be aware of the existence of differing statutes of limitations?

STATUTE INVOLVED.

The pertinent portion of the Federal Rule of Civil Procedure involved (Rule 60(b)) is as follows:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;"

STATEMENT.

Introduction.

This petition represents the last desperate attempt by petitioner to frustrate the orderly administration of justice and to circumvent the now uniform system of Federal procedure solely for his own personal ends. Petitioner, an experienced New York attorney, has repeatedly ignored the admonitions of the U. S. Court of Appeals, the Federal Rules of Civil Procedure and local Court rules. In this one case he has appeared before three United States District Judges and before the U. S. Court of Appeals on three occasions. The lower Courts have been unanimous in concluding that petitioner is not entitled to the relief he seeks and that this litigation should terminate. There is no valid reason why this Court should review this case. This is particularly true since no question of public interest or national importance is here presented, nor does a conflict exist between decisions of the U. S. Courts of Appeals. This is simply a case where the District Court has properly exercised the discretion conferred on it by the Federal Rules of Civil Procedure, and the Court of Appeals has unanimously affirmed the result. This Court could not continue to perform its important and useful functions as a Court

of last resort were it to review every case where a litigant is dissatisfied with the result obtained in the lower Federal Courts. This case falls within that large group of cases which do not qualify for review by this Court.

Because petitioner's statement of the case is replete with opinion, characterization and speculation with respect to the proceedings below, it is essential that the basic facts pertinent to the question involved be restated clearly, as follows:

Nature of the Case.

Petitioner, a New York attorney of some 37 years standing at the bar, brought this tort action to recover $978,862.50 damages from respondents, the well-known and highly regarded Houston, Texas law firm of Vinson, Elkins, Weems & Searls, and the twenty-seven partners of that firm (A17, A28, A48-54). It arises out of prior litigation in the United States District Court for the Southern District of Texas between the petitioner here and one Francis M. Blair, who is not a party to this action (A39, A56). In the Texas litigation (*Benton* vs. *Blair*) respondent here, David T. Searls, and certain of his associates in Vinson, Elkins, Weems & Searls represented defendant Blair (A39). At the conclusion of plaintiff's case, the trial judge (Hon. Ben C. Connally) directed the entry of judgment dismissing the complaint (A39). On appeal, the Court of Appeals for the Fifth Circuit reversed and directed a new trial on the ground that plaintiff's evidence "was sufficient to make a *prima facie* case" (A39-40; 288 F. 2d 55). The action was not retried as directed by the Court of Appeals, but was settled by the payment of $21,137.50 to petitioner Benton after pretrial proceedings and settlement negotiations in which Benton was represented by Warren P. Cunning-

ham, Jr., an attorney from Houston, Texas (A40; R138-139).

The instant action was commenced in the Supreme Court, New York County on November 27, 1956 by the service of a summons without a complaint upon the respondent Searls (A39; R2). None of the other respondents was personally served (A55). Respondent Searls appeared generally on December 13, 1956 and removed the action to the District Court for the Southern District of New York on the ground of diversity of citizenship (A38, A39; R1-4). The complaint was served and filed on January 2, 1957 (A1, A39).

The Complaint.

The complaint in this action contains three separate claims for relief which may be summarized as follows (A48-54):

First, that defendants, as attorneys for Francis M. Blair in the Texas litigation, "knowingly misrepresented to the court material facts" and "caused the trial court unwittingly and mistakenly to believe such facts so misrepresented, and thus the defendants procured a clearly erroneous judgment against the plaintiff (petitioner), as held conclusively and finally by the United States Court of Appeals for the Fifth Judicial Circuit, to the damage of the plaintiff in the sum of $25,000" (A49). The complaint contains no factual allegation of the manner in which defendants tortiously overstepped the recognized prerogatives of advocacy and transgressed the ethical obligations of an attorney (A60). Nor does the complaint allege how plaintiff was damaged by any misrepresentation which may have been made by defendants to the trial court in the

Texas litigation in view of the decision of the Court of Appeals for the Fifth Circuit directing a new trial.

Second, that plaintiff and Blair entered into a stipulation in the *Blair* action whereby Blair agreed not to dispose of certain partnership assets pending final disposition of the Texas litigation (A49-50); and that defendants in procuring the "judgment from the said trial court tortiously and wrongfully caused the said Blair to breach" this stipulation "and did so in his behalf under color of right evidenced by an unauthorized attempted release thereof by the said trial court" (A50). Plaintiff claims to have been damaged thereby in the amount of $1,000,000 although he subsequently settled his action against Blair for $21,137.50 (A40, A53).

Third, that defendants because of their "great influence in Houston, Texas * * * caused the trial judge * * * to have a bent and prejudiced mind against this plaintiff" (A50) and the trial judge "evinced his intention and purpose of not proceeding fairly and dispassionately with the further trial of the action, of his prejudgment of the case, and of deciding the facts against plaintiff" (A52); thereby preventing plaintiff from obtaining a fair and impartial further trial (A53); and that plaintiff because of "nervous exhaustion, fear and financial distress" was "coerced, harassed and compelled under duress" to compromise his claim against Blair for "a pittance of approximately $21,137.50" (A53) although he "would have been entitled to recover judgment against the said Blair for properties of a value of approximately $1,000,000" (A53).

The Proceedings in the Courts Below.

On January 10, 1957 respondent Searls moved, pursuant to 28 U. S. C. A. §1404 (a), to transfer this action to the United States District Court for the Southern District of Texas (A40). The motion was argued on January 18, 1957 before District Judge Sylvester J. Ryan (A41). Petitioner, who as previously stated is an experienced New York attorney, argued the motion on his own behalf (R237). During the argument, Judge Ryan inquired as to whether any question of the Statute of Limitations was involved in this case and petitioner made no claim that any such question was involved (A65).

After argument of the transfer motion petitioner served a cross-motion for summary judgment on issues of liability (A41). Respondent Searls promptly served a notice specifying defects in petitioner's motion papers which rendered them defective and of no legal effect (R134-135). Petitioner thereafter made no attempt whatever to correct these defects.

While the transfer motion was *sub judice,* respondents (other than David T. Searls) moved to dismiss the complaint on the grounds that the Court did not have jurisdiction over the person of the respondent partnership and the individual partners thereof and that the attempted service of process on such respondents was insufficient. This motion was referred to Judge Ryan (A40, A41).

On January 28, 1957, petitioner, as co-counsel for himself, submitted to Judge Ryan a brief in connection with the transfer motion. In this brief, petitioner cited the case of *Headrick* v. *Atchison, T. & S. F. Ry. Co.,* 182 F. 2d 305 (10th Cir. 1950), which is one of the leading cases on the question of the consideration to be given to the

Statute of Limitations in connection with a motion to transfer (A44-45, A64). It must be assumed that petitioner read the *Headrick* case before citing it and his having done so precludes his subsequent claim (repeated in the petition herein, pp. 8, 26) of ignorance, before the transfer motion was decided, of the differing statutes of limitations of New York and Texas.

In a twelve page opinion dated February 28, 1957 (A55-63), Judge Ryan granted the motion to transfer; denied the motion for partial summary judgment and denied the motion to dismiss for lack of jurisdiction, without prejudice to a renewal thereof in the transferee forum, if respondents were so advised. In his opinion Judge Ryan stated:

> "The charges which plaintiff makes in his present complaint are of an extremely grave and serious nature. Due respect for the administration of justice requires that they be openly heard and tried in the very forum where the alleged tortious acts are claimed by him to have occurred. Plain and simple justice to the court of that district, to the judge who is named and to the members of the bar, who are named as defendants, dictates that they not be required to make defense in a distant forum. The primary issue presented is plainly the personal integrity of that court and of the bar of that district. Those who were involved in the Blair suit, its conduct and subsequent settlement all are residents of the district to which transfer is sought" (A62).

Regarding petitioner's charges that he could not obtain a fair trial of this action in Texas, Judge Ryan stated:

> "The statement that plaintiff makes in his brief that New York is 'the only jurisdiction available to plaintiff where both parties may be assured of a fair trial, before an unprejudiced jury, and a judge who

> may be assuredly unprejudiced as to all' reflects no credit upon him, is unworthy of a member of the Bar and cannot be overlooked even when one considers that his personal interest in the outeome of this litigation may have warped his „judgment'' (A62).

The order directing the transfer of this action to the Texas District Court was entered on March 11, 1957 and provided therein that the time for respondents to move or answer with respect to the complaint was extended until after the file in the action was actually received by the Clerk of the transferee Court (R237-238).

Before the file could be physically transferred to the Clerk of the District Court in Texas, petitioner, on March 18, 1957, filed in the Court of Appeals for the Second Circuit a petition for a writ of prohibition or an order vacating the order transferring this action to the Texas District Court (A41). There petitioner contended that Judge Ryan abused his discretion in granting the transfer. The petition for a writ was argued on April 8, 1957 and on April 16, 1957 the Court of Appeals in a *per curiam* decision denied the petition (A41).

Prior to the return of the file to the District Court for transfer to the Texas District Court, petitioner, on April 26, 1957 served and filed a notice of voluntary dismissal of this action pursuant to Rule 41(a) (1) of the Federal Rules of Civil Procedure (A41-42; R258). Respondent Searls moved to vacate this notice of dismissal. Petitioner vigorously opposed the motion which was granted in an opinion and order dated May 31, 1957 (A42; R289-293; R299-307). Petitioner moved for reargument of this motion (A42; R309-319; R339-342B).

While his application for reargument was *sub judice*, petitioner, on June 19, 1957 obtained an order requiring

respondents to show cause on June 25, 1957 "why the court should not issue the following orders:

(a) Granting leave to plaintiff to file the amended complaint attached to the annexed motion *and* ordering that jurisdiction of the action be retained on the basis of the amended complaint, and ordering that the record herein be not transferred to the U. S. District Court for the Southern District of Texas; and

(b) An order granting leave to plaintiff to withdraw the notice of dismissal heretofore filed in the event the foregoing combined relief be granted;"* (A7-8).

Neither the June 19, 1957 order to show cause (quoted above) nor petitioner's supporting affidavit, sworn to June 19, 1957 (A7-14) makes any reference to any Federal Rule of Civil Procedure pursuant to which petitioner was seeking relief from the Court and more particularly, no mention whatever was made of Rule 60(b) of said Rules (Relief from Mistakes, Inadvertence, Excusable Neglect, etc.), on which petitioner now claims he was then relying.

In opposing this motion, which was argued July 9, 1957, respondent Searls contended that since his motion to vacate petitioner's notice of dismissal had been denied* and since petitioner sought leave to withdraw his notice of dismissal only on condition that the Court first grant the other relief sought by his motion, the notice of dismissal effectively terminated the action and the Court lacked jurisdiction to hear and determine the motion (R355-382). In his memorandum and order of July 12, 1957 U. S. District Judge Thomas F. Murphy so held, stating:

---

* Before this motion was heard, Judge Cashin on June 24, 1957 granted petitioner's application for reargument of respondent Searls' motion to vacate the notice of dismissal and, because of intervening decisions of the Court of Appeals for the Second Circuit, reversed his decision of May 31, 1957 and denied respondent Searls' motion to vacate the notice of dismissal (A42; R328-333).

> "Since there is no action pending in this district because of plaintiff's voluntary dismissal the court lacks jurisdiction and the motion is, in all respects, denied. This is an order. No settlement is necessary" (A42).

Petitioner's motion for reargument was denied on August 7, 1957 (R343-346).

Petitioner then appealed to the U. S. Court of Appeals for the Second Circuit. Respondent Searls moved to dismiss the appeal on the ground that there had been no final decision terminating the litigation on the merits (A43). On October 17, 1957, the Court of Appeals denied the motion to dismiss the appeal in the following opinion:

> "Motion to dismiss the appeal is denied, since we think the order below final for the purposes of appeal. Plaintiff appears to have presented his motions below in the wrong order. Had he moved first to vacate the notice of dismissal we do not see why the court would not have jurisdiction. The plaintiff's intent being clear, we think the court should first pass upon the motion to vacate, thereafter considering the other motions if still pertinent. The action is therefore reversed and remanded" (A43).

The Order Sought to be Reviewed Here.

a. Proceedings in the District Court.

On November 6, 1957 petitioner served a notice of motion "for the further hearing, consideration and determination of plaintiff's motion filed herein on June 20, 1957 for (1) leave to file an amended complaint and for an order that the action be not transferred to the U. S. District Court for the Southern District of Texas, and (2) for leave to withdraw the notice of dismissal theretofore filed in the event

the foregoing relief be granted" (A6-7, A43). Petitioner, an experienced attorney, persisted in presenting his motions in what the Court of Appeals in its October 17, 1957 opinion (quoted above) found to be "the wrong order" and failed to move "first to vacate the notice of dismissal" which the Court held would have given the District Court jurisdiction. Furthermore, no mention was made of the Federal Rule of Civil Procedure or statute pursuant to which petitioner sought relief from the District Court. Finally, petitioner, "a lawyer of some 37 years' standing at the bar" (A17), admitted at the argument of this motion before District Judge William B. Herlands on November 26, 1957, that he failed to serve with his notice of motion a supporting affidavit or any papers whatever (A22), as is required by Rule 6(d) of the Federal Rules of Civil Procedure. He ignored the well-established practice on a motion of this kind which was succinctly explained to him at the hearing on the motion by Judge Herlands as follows:

> "Your obligation, when you are making a motion under Rule 60(b), you just can't come into court and say that you made a mistake and you want to be relieved of it because the burden is on you to set forth in your motion papers * * * the facts and circumstances showing the mistake, inadvertence or excusable neglect.
>
> "You just come here and serve a notice of motion and ask the Court to go through a voluminous file and the opinions of other judges and the opinions of the Court of Appeals and try to figure out on the basis of the record what facts and circumstances there are in support of your motion.
>
> "Your support is to submit an affidavit and brief to set forth all these facts, but particularly the moving affidavit" (A34-35).

Plaintiff's weak explanation for his flagrant violation of the Rules was:

"I misconceived that" (A34).

Despite this unauthorized procedure originated by petitioner, affidavits opposing his motion were duly served and filed on behalf of respondent Searls. When this motion was called for argument before Judge Herlands, the petitioner requested that a stenographic record of the argument be made, and accordingly the entire argument is recorded (A17-37). Reference to the transcript (A17-37) will readily demonstrate that more than two-thirds of the transcript is devoted to petitioner's argument and to colloquy between him and the Court.

In ruling on petitioner's motion, Judge Herlands assumed that petitioner's notice of motion "is all right" (A36), that petitioner "submitted an affidavit" (A36), and that the facts presented by petitioner on oral argument "are true" (A35) and Judge Herlands accepted petitioner's oral presentation "with the same force and effect as if they were set forth in an affidavit" (A36). With all of these assumptions favorable to petitioner, Judge Herlands found that there was no mistake here (A36), that petitioner's voluntary dismissal with advice of independent counsel "was a deliberate, calculated, thought-out move" (A35) and that "there isn't the slightest justification for the Court, considering the total record here, to permit you [petitioner] to vacate the notice of dismissal" (A35).

Accordingly, Judge Herlands denied the motion from the bench (A37) and thereafter endorsed and signed on the back of petitioner's notice of motion a memorandum order reading:

"Motion denied in its entirety. So ordered" (A7).

Counsel for respondent Searls applied to the Court, pursuant to General Rule 10 of the Rules of the United States District Courts for the Southern and Eastern Districts of New York, for a long form order (A66-67). Counsel did so to insure that the Court of Appeals would read the transcript of the proceedings (in full) before Judge Herlands, and conclude, as Judge Herlands did, that this litigation should terminate. Every indulgence in regard to unauthorized procedures, inadequate papers, untimeliness and so forth has been accorded the petitioner in spite of the fact that he has been a member of the bar for "some 37 years" (A17) and formally settled for $21,137.50 the claim and lawsuit on which this alleged action is predicated.

After receiving notice of this application and a copy of the proposed long form order, petitioner on December 6, 1957 filed his objections thereto.* At the same time, petitioner filed his notice of appeal to the Court of Appeals (R442, R486-489).

b. Proceedings in the Court of Appeals.

In the Court of Appeals, petitioner argued that the Texas Statute of Limitations would bar his action whereas the New York Statute would not, that he and his counsel had made a mistake in not being aware of the Texas Statute at the time he filed his voluntary discontinuance of the action, that, since on the basis of his proposed amended complaint, there is no ground for transferring the action to Texas, jurisdiction should be retained in New York, and that there was an abuse of discretion in the District Court.

Respondent on the other hand contended that petitioner's motion was one invoking the discretion of the District Court, that the District Court had not abused its discretion

* Judge Herlands signed the long form order on December 6, 1957 (A68).

or treated petitioner unfairly in the hearing and denial of his motion, that there had been no mistake justifying the relief sought by petitioner and that even if petitioner had made a mistake, it was not such a mistake as to justify relief under Rule 60(b) (1) of the Federal Rules of Civil Procedure.

The Court of Appeals adopted respondent's contentions. It unanimously held that the motion invokes "the discretionary power of the District Court", that "that discretion was not improperly exercised here", that it was not clear that a mistake had been made or if made that it was material and finally that "In any event, ignorance of the Texas limitation period on the part of the appellant, an experienced lawyer, is not under the circumstances here disclosed the kind of 'mistake, inadvertence, surprise, or excusable neglect' contemplated by rule 60 (b)" (App. to Petition, p. 2A). Accordingly, the Court of Appeals affirmed the order of the District Court. Petitioner's subsequent application for rehearing was denied (App. to Petition, pp. 2A-3A).

I.

This Court should not grant certiorari to review the unanimous affirmance by a U. S. Court of Appeals of a purely discretionary order of the District Court which affects only the private interests of petitioner and does not present a substantial question of public importance or a conflict with decisions of this Court or other Courts of Appeal.

The law is well established that a motion under Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from mistake or inadvertence invokes the discretion-

ary power of the District Court. *Fischer* v. *Dover Steamship Co., Inc.*, 218 F. 2d 682 (2d Cir. 1955); *Smith* v. *Kincaid*, 249 F. 2d 243 (6th Cir. 1957); *Rychlik* v. *Brotherhood of Railroad Trainmen*, 130 F. Supp. 580 (W. D. N. Y. 1955). The Court of Appeals in the instant case recognized and applied this prevailing rule, and, after considering the facts and hearing argument, held that such discretion had not been improperly exercised by the District Court.

The discretionary order of the District Court denying petitioner's motion under Rule 60(b) having been affirmed by the Court of Appeals, it would not be proper for this Court to give the petitioner still another hearing on the same discretionary order. This Court has long recognized that its jurisdiction on review is not to sit for the purpose of reviewing discretionary orders in the lower courts. *Ward* v. *Joslin*, 186 U. S. 142, 153 (1902); *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592, 598 (1864). In this latter case, this Court said at p. 598:

> "Indeed, the universal rule of practice is, that matters resting entirely in discretion are not re-examinable in a court of errors, and there can be no departure from that rule in this court without overruling its settled practice from the organization of the court to the present time."

The petitioner attempts to convert the application of a single procedural rule, 60(b) of the Federal Rules of Civil Procedure, into a broad federal question by claiming that the denial of his motion in the District Court "will operate to complicate and confuse the administration of justice in the federal courts, and to destroy private rights of substantial value" (Petition, p. 2).

It is apparent that this hypothesis for bringing the cause before this Court will not stand the tests for review

on certiorari as enunciated in opinions of this Court. This Court does not sit for the benefit of individual litigants seeking but further review of questions which have arisen in connection with their personal and particular causes of action. The cases must involve questions of importance which it is in the public interest to have decided by this Court of last resort. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163 (1923). The question should not be reviewed merely because it is scholarly or presents an intellectually interesting problem, but it must involve some special and important reason which reaches beyond the academic or episodic. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74 (1955). Certiorari should be granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the courts of appeal. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923); *Fields* v. *United States*, 205 U. S. 292, 296 (1907).

In essence this case involves a simple procedural question entirely within the discretion of the District Court. The District Court found, and the Court of Appeals affirmed the finding, that petitioner, an experienced lawyer, was not entitled to relief under Rule 60(b) (1) in claiming to be ignorant of the Texas two-year statute of limitations. The District Court, in its discretion, ruled that such ignorance in this case was not the kind of "mistake, inadvertence, surprise or excusable neglect" contemplated by Rule 60(b). Certainly this simple ordinary procedural question does not present any vast problem of peculiar gravity or general importance. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258 (1916); *American Construction Co.* v.

Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 383 (1893); *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58 (1892).

The petitioner further asserts that the District Court's order, as affirmed by the Court of Appeals, is based upon law which is "overcome by numerous Supreme Court decisions to the contrary" (Petition, p. 27). Petitioner has cited no cases in his petition to show that the decision of the Court of Appeals here is "overcome" by decisions of this court, or is in conflict with decisions of other Courts of Appeals. In not one of the many cases cited by petitioner was there involved a question of a removal of an action from a state court to a federal court and a subsequent transfer from the federal court to a federal court in another state.

There is patently no conflict with decisions of this Court or with decisions of the various Courts of Appeals on any question involved in this case, and petitioner's attempt to create such a conflict as a means of seeking certiorari is groundless.

II.

The unanimous holding of the Court of Appeals that there was no abuse of discretion in the consideration and denial of petitioner's motion in the District Court is clearly supported by the record.

Petitioner claims there was an abuse of discretion by the District Court in failing to read certain papers claimed to be a part of his motion argued on November 26, 1957 (Petition, p. 10). The papers were (1) "the motion of plaintiff of June 19, 1957, and his accompanying affidavit" and (2) "the plaintiff's memorandum on motion for leave to file amended complaint, etc. filed at the hearing on November 26, 1957".

This contention is apparently the basis for petitioner's scandalous and repetitious charge that Judge Herlands "inconsiderately, impulsively and impetuously" denied his motion (Petition, pp. 10, 16, 17, 20, 34, 35, 42).

As to the "motion of plaintiff of June 19, 1957 and his accompanying affidavit", these papers constituted the papers submitted, not in support of the motion argued before Judge Herlands on November 26, 1957, but in support of the motion argued before Judge Murphy on July 9, 1957 and denied by him on July 12, 1957 (A42, *supra*, p. 11). At the hearing before Judge Herlands, petitioner admitted that there were no affidavits filed in support of the motion then being argued (A22).

As to petitioner's memorandum filed at the hearing on November 26, 1957, regardless of whether or not in fact Judge Herlands read the memorandum (it is petitioner's assumption only that he did not), petitioner was given ample opportunity to present his contentions at length on oral argument before Judge Herlands and did so. Over two-thirds of the transcript of the argument of the motion consists of petitioner's argument and the colloquy between petitioner and the Court. After petitioner had stated the three reasons why he claimed he should be relieved of his alleged mistake (A27) (reasons which were merely repeated in his memorandum), Judge Herlands asked him "What is point 4?" (A28). Petitioner replied "Those in headline form are my reasons" (A28). After argument by respondent's counsel, petitioner stated he wanted to answer "Very briefly" and was given the opportunity to do so (A34).

Thus there is clearly no basis for petitioner's claim of an abuse of discretion; nor is there any basis for his reckless charge that Judge Herlands "inconsiderately, impulsively and impetuously" ruled on the motion. A simple reading of the transcript of the argument before Judge

Herlands (A17-37) demonstrates the absurdity of these charges. The transcript clearly shows that Judge Herlands gave petitioner the benefit of every possible doubt. Petitioner's failure to comply with the direction of the Court of Appeals that he first move to vacate his notice of dismissal and petitioner's failure to serve supporting affidavits with his notice of motion as required by Rule 6(d) of the Federal Rules of Civil Procedure, were, in effect, all excused by Judge Herlands (A30-31). The Court even assumed that all of the facts stated by petitioner were true and that they were properly submitted in affidavit form (A35, A36). Under these circumstances it is inconceivable that petitioner would even dare to charge that he had been treated unfairly.

III.

Petitioner's motion to withdraw his notice of dismissal, for leave to file an amended complaint and for an order preventing transfer was properly denied by the District Court and the Court of Appeals did not err in unanimously affirming the denial.

A. There was no mistake or inadvertence by petitioner.

The only ground upon which petitioner relied in the District Court to support his motion for leave to withdraw his voluntary notice of dismissal was a claimed mistake in failing to apprehend, at the time he filed his notice of dismissal, that if this action is transferred to Texas, it might be barred by the Texas two-year Statute of Limitations whereas if it remains in New York, it will not be barred by the New York three-year Statute of Limitations. The District Court and the Court of Appeals properly held that no such mistake was established by petitioner (A36, Appendix to the Petition, p. 2A).

The following facts amply justify this holding:

1. When the motion to transfer this case to the Texas District Court was argued before Judge Ryan on January 18, 1957, the issue of whether any question of the Statute of Limitations was involved in this case was specifically raised by Judge Ryan himself (A65). Petitioner, an experienced attorney, who argued the motion on his own behalf, made no claim that any such question was involved (A65). Even if petitioner in fact was unaware of the problem on the day of argument, he had ample time to research the question and present his views to Judge Ryan, since the motion was not decided until February 28, 1957, over a month later. However, petitioner did not do so. Petitioner claims that it was not until after he filed his notice of dismissal on April 26, 1957 that "by studious care" he found that the Statutes of Limitations in New York and Texas were different (A24-25). Such complete indifference to a question raised by the Court certainly does not support a claim of inadvertence or mistake.

2. Furthermore, this belated claim of ignorance will not withstand test, as on January 28, 1958 petitioner filed with Judge Ryan an eight-page brief opposing the transfer motion (A44). At page 5 of this brief (A64) petitioner cited the case of *Headrick* v. *Atchison, T. & S. F. Ry. Co.*, 182 F. 2d 305 (10th Cir. 1950). This is one of the leading cases on the question of the consideration to be given to the Statute of Limitations on motions to transfer. Having cited the case, certainly it must be presumed that petitioner read it and that having done so, his attention was attracted to a consideration of this question on transfer motions. A claim of mistake under these circumstances is preposterous and beyond credulity.

Just as there was no mistake by petitioner, so also there was no inadvertence when he filed his notice of dismissal. He glibly admitted to Judge Herlands that he deliberately filed the notice of dismissal to prevent the transfer to the Texas District Court, which Judge Ryan had ordered. (A26). Judge Herlands in this connection stated:

> "The fact remains that you [petitioner] discontinued this action. You did it voluntarily. You say you are a lawyer who has practiced for 30 years; You have had counsel. That dismissal which was voluntarily filed was not an impulsive act. It was a deliberate, calculated, thought-out move" (A35).

Under these circumstances, it is difficult to understand how petitioner can argue that the filing of the notice of dismissal was inadvertent.

B. The mistake, if made, is immaterial.

Even if one assumes that petitioner made a mistake in not being aware of the differing Statutes of Limitations in New York and Texas, it is an immaterial mistake which in this case does not justify relief under Rule 60(b). The *Headrick* case, *supra*, p. 7, establishes that when an action commenced in a state court is removed to a Federal Court in that state and thereafter transferred to a Federal Court in another state, the statute of limitations of the state where the action was commenced must be applied in the transferee Federal Court. The *Headrick* case was originally commenced in the New Mexico State Court and removed by defendant to the New Mexico Federal Court on the grounds of diversity of citizenship. Defendant then moved to dismiss the action or in the alternative to transfer it to California. The District Court dismissed the complaint on the ground of *forum non conveniens* indicating that it would have transferred the action to California had the Statute

of Limitations of that state not run, but since it had, a transfer would be futile and unavailing. The Court of Appeals for the Tenth Circuit reversed and remanded for further consideration as to where the balance of convenience lies.

In its opinion, the Court considered the effect of differing statutes of limitations as applied to transfer motions, *particularly in cases originating in State Courts*, and stated at pp. 309-310:

> "Then, too, we think the court was in error in assuming that upon transfer from the District of New Mexico to the District of California under the provisions of §1404(a) the California statute of limitations would be applicable. The plaintiff's action was transitory in its nature. He had a legal right to select any forum where the defendant was amenable to process and no contention is made here that the case was not properly brought in the New Mexico state court. It is conceded that the action is not barred by the New Mexico statute. Had the case been tried in the New Mexico state court, the procedural laws of New Mexico including the statutes of limitation would be applicable. It is a well established principle that in removal cases the Federal Court must apply the state law and the state policy.
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> "Neither can a Federal Court in a diversity case take away that which a state has given. Upon removal to the Federal Court in New Mexico, the case would remain a New Mexico case controlled by the law and policy of that state, and if §1404(a) is applicable and a transfer to the California court is ordered for the convenience of the parties the witnesses and in the interests of justice, there is no logical reason why it should not remain a New

> Mexico case still controlled by the law and policy of that state."

So in the instant case, a transitory action originally commenced in the New York State Court and removed to the Court below, the fact that the statutes of limitations of New York and Texas may be different would be no ground for denying a transfer to the Texas District Court even if petitioner had been aware of the differing statutes of limitations and had urged them before Judge Ryan in January 1957 when the transfer motion was argued. Thus, it is clear that petitioner's mistake, assuming there was one, is immaterial.

Furthermore, even if the Texas two-year Statute of Limitations was applied to this action after it was transferred to the Texas District Court, that statute would not bar the claim alleged in petitioner's complaint herein. The complaint (A48-54) alleges that the tortious acts which form the basis of petitioner's claim were committed by the defendants before the trial court in the Texas action of *Benton* v. *Blair*. That trial commenced on December 13, 1954. The Texas two-year Statute of Limitations did not expire until December 13, 1956, whereas the instant action was commenced on November 27, 1956. Petitioner has attempted to mislead this Court and the Courts below (Petition, p. 22; A10-11) by claiming that certain tortious acts involved in this action were committed *prior to* the commencement of the trial of the Texas action. There is no such allegation in petitioner's complaint (A48-54). Petitioner's belated reliance upon such acts is merely an afterthought to support his spurious argument in this Court and in the Courts below.

C., The amended complaint and order preventing transfer.

If petitioner were permitted to withdraw his notice of dismissal, this action would then revert to the status existing at the time the notice was filed on April 26, 1957. At that time Judge Ryan's transfer order of March 11, 1957 was fully effective, the Court of Appeals on April 16, 1957 having denied petitioner's petition for a writ of prohibition or order vacating the transfer order. Thus, if the notice of dismissal is withdrawn, the transfer order is reinstated and the only court having jurisdiction of any further motions in this case is the Texas District Court. Otherwise the anomalous situation is created of a New York District Court permitting the amendment of a complaint which, as Judge Herlands noted, "has heretofore been ordered transferred to Texas" (A35).

There is no authority in the Federal Rules of Civil Procedure, or elsewhere, for an order directing that a case previously ordered transferred to another district, be retained in the transferor district. The District Court properly denied this request by petitioner, particularly in view of the fact that the Court of Appeals previously denied a petition for an order vacating the transfer order. This request is nothing but a scheme originated by petitioner to obtain another review of the propriety of transferring this action to the Texas District Court. Such conduct was not countenanced by either the District Court or the Court of Appeals. As stated by the District Court "There has got to be some finality to litigation. We just can't have this revolving-door method of disposing of matters" (A36).

Furthermore, even if such a procedure were authorized, there is no basis for granting the relief requested by

petitioner and his motion was properly denied. Petitioner claims, that if he was permitted to file his proposed amended complaint, the sole basis for Judge Ryan's transfer order (the third cause of action in the original complaint (A50-53)) would no longer exist. There is no merit in this contention.

In his opinion Judge Ryan stated:

> "The charges which plaintiff makes in his present complaint are of an extremely grave and serious nature. Due respect for the administration of justice requires that they be openly heard and tried in the very forum where the alleged tortious acts are claimed by him to have occurred. Plain and simple justice to the Court of that district, to the judge who is named and to the members of the bar, who are named as defendants, dictates that they not be required to make defense in a distant forum. The primary issue presented is plainly the personal integrity of that court and of the bar of that district. Those who were involved in the Blair suit, its conduct and subsequent settlement all are residents of the district to which transfer is sought" (A62).

It is obvious that Judge Ryan in no way limited these statements to the third cause of action in the complaint but rather was addressing himself to the complaint as a whole. The two causes of action alleged in the proposed amended complaint (A14-16) are essentially copies of the first two causes of action alleged in the complaint herein. What was said by Judge Ryan concerning the charges made in the complaint is equally true of those made in the proposed amended complaint. Accordingly, there is no merit to petitioner's contention that if he is permitted to file his proposed amended complaint, the sole basis for Judge Ryan's transfer ord ould be eliminated.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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